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THE "RUN-OFF" ELECTION UNDER THE WAGNER ACT — A REVIEW AND A PROPOSAL

BERTRAM F. WILLCOX AND STANLEY M. LEVY

Free political elections have long been a part of the fibre of American life. During the past decade free industrial elections have attained comparable importance. They relate to a different aspect of the voter's life, his life as a worker, but they may often affect him more deeply than political elections do. It is the object of this paper to show a way in which the machinery of industrial elections can be improved.

The political election is final, but the industrial election is only advisory. The results of the industrial election are evidence which a government agency may use to make decisions. In matters affecting interstate commerce, for example, the National Labor Relations Board has the task of deciding disputes over what union, if any, shall represent the workers of a particular bargaining unit, and of certifying its decision to the parties. This the Board does when the parties have agreed (or the Board has decided) upon the appropriate bargaining unit but the parties cannot agree on a union for that unit. As an aid to the Board in deciding this issue, the Wagner Act permits the use of an election. It does not require one, and the Board is free to use other methods for investigating and deciding, if it prefers to do so.

The Act puts the task in the most general terms, leaving all details to be worked out in the experimental processes of administration. Specifically, the Act says that the representative designated or selected for collective bargaining by the majority of employees in any appropriate unit shall be the exclusive representative for all the employees in that unit, and that when the Board investigates this question it shall hold a hearing and may take a secret ballot of employees or utilize any other suitable method.[1]

Here is much room for experimentation, and much experimentation there has been. At first the Board used comparisons of payroll records with union cards, called "cross-checks", and certified many unions without election. But experience has gradually shown the election to be the best method, and

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[1] 49 STAT. 449 *et seq.*, 453 (1935); 29 U. S. C. §§ 151 *et seq.*, 159 (1940) referred to in the text as the "National Labor Relations Act," the "Wagner Act" or simply the "Act". §§ 9(a) and 9(c), referred to in the text, read as follows:

9(a) "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the

in increasing numbers elections have been ordered. On November 27, 1945, the holding of elections was even made routine procedure, no longer requiring preliminary hearing and a special order of the Board for each case.[2]

The magnitude of this new phenomenon, the industrial elections, is reflected by the following recent statement of the Board: "During the 11-year period, the Board conducted approximately 30,000 elections and cross checks, in which about 8,140,000 employees were eligible to express their collective bargaining desires. The importance of self-determination to the American worker is demonstrated by the consistently high percentage of eligible employees who have exercised the franchise. Throughout this period, 6,813,537, 83% of those eligible to vote,[3] went to the polls to express themselves for or against a bargaining representative."[4] Bearing in mind that these random figures relate to interstate commerce only, and that many State Boards conduct similar elections, it is clear that the problems of the industrial election are matters of considerable public importance.

One of the knottiest of these problems, and one of the most crucial, is that of the "run-off" election. If the initial ballot contains spaces in which to vote for one of two unions or more and contains also a space in which the worker may vote against having any union at all, it may happen that none

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purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

9(c) "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

[2]This change was made by amendments to Article III of the Rules and Regulations of the National Labor Relations Board, which authorized the Board's Regional Directors, "in cases which present no substantial issues," (other than designation by a majority) to conduct an election. *See* Tenth Annual Report of the National Labor Relations Board, p. 15, footnote 3. Hearing is a matter of right but the hearing may be held later. The Board's field examiners and attorneys may also conduct such pre-hearing elections. *See,* for the Board's present practice in these respects, National Labor Relations Board, Statement of Procedure, §§ 201.18, 202.19 (11 F. R. of Sept. 11, 1946, pp. 177A-622).

[3]This 83% of eligible voters who vote, incidentally, would be high by comparison with political elections. It is typical of industrial elections, partly because pains are taken to make it convenient for all to vote, and partly, no doubt, because workers are vitally interested in a matter which affects them so closely.

[4]Eleventh Annual Report of the National Labor Relations Board, for the fiscal year ending June 30, 1946.

of these choices will receive a majority of all the ballots cast. In such a case the Board usually orders a run-off election. What choices ought to appear upon the second, or run-off, ballot?

Should it present a choice between the highest union and no union at all? The Board so decided in the *Coos Bay* case,[5] in October, 1939. Should it present a choice between the two highest unions? The same Board so decided five months later in the *LeBlond* case.[6] If more workers vote for "no-union" than for either of the two unions, should any run-off at all be held? At the end of another three months the same Board said "no" and dismissed the petitions for investigation in the *General Motors* case;[7] no two of the three Board members could agree. Should all except the two highest choices be eliminated in every case? This would follow the logic and the analogy of the political run-off election.[8]

Where "no-union" has a plurality, as in the *General Motors* case, should a run-off be held between the higher union and "no-union"? Where "no-union" comes in second, or worse than second, should a run-off be held between the two highest unions only? These two solutions, with some exceptions and qualifications, represent the policy of the Board as expressed in a Regulation which it adopted, after public hearings, in the summer of 1943.[9] One of the most important of the qualifications is that no union shall

[5]In the Matter of Coos Bay Lumber Co., 16 N. L. R. B. 476 (1939), Mr. William M. Leiserson dissenting. The result reached was the same which the Board had arrived at a year before, without giving much thought to the matter, in In the Matter of Aluminum Line, 9 N. L. R. B. 72, 79 and 91 (1938). The Board had temporarily departed from this solution of the run-off problem in In the Matter of Aluminum Co. of America, 12 N. L. R. B. 237 (1939) in which it had adopted the policy of ordering successive run-offs until a majority for some union or for "no-union" should result in one. In each such run-off that union was to be dropped which had received the smallest number of votes in the preceding election. The Board remarked that the issue had not been squarely presented in In the Matter of Aluminum Line, 9 N. L. R. B. 72.

[6]In the Matter of R. K. LeBlond Machine Tool Co., 22 N. L. R. B. 465 (1940), partial dissents by Chairman Madden and Mr. Leiserson.

[7]In the Matter of General Motors Corp., 25 N. L. R. B. 258 (1940). Each of the three Board members took a different view. The results of this trio of decisions are easier to understand if it is noted that the Board takes two votes in each case: the first, on the question whether a run-off election shall be ordered; and the second, if the motion for a run-off has carried, on the question whether a proposed ballot-form shall be adopted.

[8]The Board temporarily adopted this view, as among unions in In the Matter of Aluminum Co. of America, 12 N. L. R. B. 237 (1939). *See also* note 5 *supra*.

[9]*See*, for the present provisions, National Labor Relations Board, Rules and Regulations, Series 4, issued August 28, 1946. The change had become effective on August 23, 1943. The full text, which has not been changed in very material respects since its adoption, now reads as follows:

find a place upon the run-off ballot unless that union polled at least 20% of the votes cast in the original election. Since the average for each of three choices would be 33⅓%, this limitation upon the other rules must operate

(a) The agent designated pursuant to the provisions of Section 203.55 to conduct the election, shall conduct a run-off election, without further order of the Board, when the results in the election are inconclusive because no choice on the ballot in the election received a majority of the valid ballots cast and when no objections are filed as provided in Section 203.55: *provided,* that a written request by any representative entitled to appear on the run-off ballot pursuant to this Section is submitted to him within ten (10) days after the date of the election. Only one run-off election shall be held pursuant to this Section.

(b) Employees who were eligible to vote in the election and who are employed in an eligible category on the date of the run-off election shall be eligible to vote in a run-off election.

(c) The ballot in the run-off election shall provide for a selection between the two choices that receive the largest and the second largest number of valid votes cast in the election, except as provided in this paragraph or otherwise directed by the Board.

(1) In the event the number of votes cast for "neither" in an inconclusive election in which the ballot provided for a choice among two representatives and "neither" is less than the number cast for one representative, but more than or equal to the number cast for the other representative, or if the votes are equally divided among the three choices, the run-off ballot shall provide for a choice between the two representatives.

(2) In the event the number of votes cast for "neither" in an inconclusive election in which the ballot provided for a choice among two representatives and "neither" is more than the number cast for either of the two representatives but the votes cast for the two representatives are tied and the combined number of votes cast for the two representatives is equal to or exceeds 50% of the total valid votes cast, the run-off ballot shall provide for a selection between the three choices afforded in the original ballot.

(3) In the event the number of votes cast for "none" in an inconclusive election, in which the ballot provided for a choice among three or more representatives and "none", is equal to the number cast for the representative with the largest number of votes, or is less than the number cast for the representative with the largest number of votes but more than or the same as the number cast for the representative with the second largest number of votes as among representatives, or is the same as the number cast for each of the two highest representatives, the run-off ballot shall provide for a choice between the two representatives.

(4) In the event the number of votes cast for "none" in an inconclusive election, in which the ballot provided for a choice among three or more representatives and "none", is less than the number cast for the representative with the largest number of votes and more than the number cast for any other representative but an equal number of votes is cast for each of two or more such other representatives, the run-off ballot shall provide for a choice among the three or more representatives, provided, however, that in the event such run-off election is inconclusive no further run-off shall be conducted.

(5) No representative shall be accorded a place on the run-off ballot unless that representative received at least twenty per cent of the valid votes cast in the election. 29 C. F. R. § 203.56 through Subdiv. (c), 11 F. R. of Sept. 11, 1946, pp. 177A-612. 613. *See also* in *"Statement of Procedure"* 29 C. F. R. § 202.20, 11 F. R. 177A-623.

to eliminate a considerable number of third-choice unions. The other important qualification is that no more than one run-off will ever be held. In this the Board Rule departs from previous Board policy as expressed in 1939.[10]

It is a purpose of this paper to suggest that none of these solutions is sound; that run-off elections in labor cases should be eliminated; that in those elections which involve two unions a simple form of two-choice ballot would better effectuate the policies of the Act.[11] We believe, furthermore, that this solution would be legal, and that it would be simple and workable in practice. It would save the money of the taxpayer as well as the time and energy of a hard-pressed agency staff.

The run-off election presents two separable problems which have usually been considered as one. One of these is the problem of contriving that a majority of all votes be cast for one particular choice, which majority may then be pointed to in supposed compliance with the Act.[12] This we may call, for convenience, the "majority problem." It is a bogus problem, because the Act does not require that a majority of all the votes be cast for a single candidate or choice. All that the Act requires is a designation or selection by a majority of the workers in a unit. Whether there has been such a designation or selection is the ultimate issue. What evidence the Board may use in deciding this issue is left to its discretion. The Act does not insist upon an election. If the Board holds one, there is no statutory requirement that a majority must vote for one union. A majority do not even need to vote at all. For all the statute says, the Board might use a sampling method like that of the public-opinion polls; and if the numbers involved were large enough, even this might not be an unreasonable exercise of discretion. But we need not go so far as that. If the Board holds an election where all workers may vote, such an election may certainly be used as evidence, and the Board may draw any reasonable inference from it concerning the preference of the entire unit.

The other problem is that of interpreting a vote for one union. We may dub this, for convenience, the "interpretation problem." It is a real problem and an important one. In considering it one should bear in mind that a union, once certified, has sweeping statutory powers to represent, not its members only, but each and every worker in the unit, to arrange their

[10] *See* note 8 *supra*.
[11] Wagner Act; Preamble and § 1, 49 STAT. 449 (1935); 29 U. S. C. § 151 (1940).
[12] Wagner Act, § 9(a); 49 STAT. 453 (1935); 29 U. S. C. § 159(a) (1940).

working lives and to make their contracts for them. Now, the question is: When a worker votes for a union, does he vote for collective bargaining by that union, or against collective bargaining by any other? The data are incapable of answering the question. And the question needs to be answered if, as we believe, it is the policy of the Act not to force any union upon any worker without giving that worker a chance to vote against that union.

Board members and judges have guessed, industriously and vehemently, at the answer to this question.[13] And the Board's present rule is, in truth, no more than a codification based on a compromise of these conflicting guesswork.

If the Board orders an election, it is not necessary, as we have noted, that a majority of the eligible voters in the unit shall cast ballots for one union. This was decided early and has been held consistently. If a majority of the eligible voters go to the polls and vote, a majority of those voting will lay a legal basis for a certification. Even if only a minority of the eligibles vote, the same result is reached if that minority are a substantial and representative fraction of those entitled.

The analogy of the political election has been relied upon here, although it has also been objected, correctly, that the analogy is inaccurate.[14] In a political election someone must be elected. It makes no difference if only a third or a fourth of the eligible voters take the trouble to vote. Those who do not are presumed to agree to the choices of those who do, and they are accordingly bound by the result. In an industrial election no one needs to be elected. If a majority of the workers in a unit do not select or designate a statutory representative, things go on as before. The "full freedom of association, self-organization, and designation of representatives of their own choosing" to be protected by the Act[15] cannot be thought to compel representation. The "freedom" is to do freely, or with equal freedom not to do. If this were not the policy of the Act, it would be incongruous to find that an employer who encourages union membership among his men is guilty of an unfair labor practice, although the union is independent and has no rival in the field. Yet such is quite clearly the law.[16]

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[13]For example *see* the instances referred to in notes 32 and 39 *infra*.

[14]*See*, for example, Chairman Madden's remarks in the LeBlond Case, 22 N. L. R. B. 465, at 470, note 6 *supra*.

[15]Wagner Act, § 1; 49 STAT. 449 (1935); 29 U. S. C. § 151 (1940).

[16]Wagner Act, § 8(3); 49 STAT. 452 (1935); 29 U. S. C. § 158 (3) (1940). In the Matter of American Car and Foundry Co., 66 N. L. R. B. 1031 (1946); In the Matter of Pittsburgh Plate Glass Co., 66 N. L. R. B. 1083 (1946) and cases relied upon, including National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc., 315 U. S. 685, 62 Sup. Ct. 846 (1942). We assume of course that the union aided has no valid contract with the employer within the "closed-shop proviso" of § 8(3).

A sounder support for the Board's practice of certifying upon a majority of those who vote is recognition of the fact that, as we have seen, the election is evidence only, which the Board may use in reaching its finding on the ultimate question of fact.

Obviously the Board ought never to employ arbitrarily its power to rely on an election in which only a small fraction of the voters have participated. If it did, its action would undoubtedly incur the disapproval of the courts. The results of the election, in other words, must give some real evidence of a selection by a majority before the Board may properly ground a certification on them.

Thus there is no problem when choice lies simply between one union and no union. But what becomes of the statutory requirement of selection or designation by a majority when two or more unions compete for the votes? This is the question which the Board has tried to answer by the run-off election, with only two choices on the second ballot. One choice now must receive a majority. But on the vital point, what two choices the run-off ballot should offer, the Board has veered about. Its lively record on this question projects an interesting picture of experimentation with a knotty problem, of adoption of various solutions in turn, and finally, of achievement of a workable balance. But the present compromise is still inadequate. It contains unnecessary possibilities for the working of injustice.

Let us glance at the history of this difficulty. Under § 7-a of the National Industrial Recovery Act[17] the problem did not yet exist, because certification under that section was not made except upon a vote by a majority of all eligibles. If there was only one union the ballot contained two choices: for it, or against it. If there were two or more unions the ballot contained the names of those unions and nothing more. Nothing more was needed. A worker who did not want any union, voted that choice, easily and effectively, by simply staying away from the polls.

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[17] 48 STAT. 195, 198-9 (1933), § 7-a:
"Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President."

The National Labor Relations Board continued at first to use the same ballot-form and procedure under the Wagner Act without giving any particular thought to the matter.[18] In July, 1936, however, the Board decided in the *Associated Press* case[19] when a majority of those eligible went to the polls, that it ought to certify upon the ballots of a mere majority of those voting. Abstention abruptly changed its character. From being a vote for "no-union", it suddenly became a vote for whatever choice was finally to prevail in the election.

In November, 1936, in the *R. C. A. Mfg. Co.* case,[20] this new policy was first applied to an election between two competing unions. There was still no place on the ballot whereby a voter could vote against any union. In spite of this fact, and in spite of the fact that one of the competing unions boycotted the election, certification was accorded to the other (which had received most of the ballots cast by the three thousand workers who went to the polls). But nearly ten thousand were eligible. The cry of the union which boycotted the election was that abstention was a vote against the other union. The opinion contented itself with discussing three possible meanings of the requirements of the Act: *first,* that a majority of those eligible vote for a union to be certified; *second,* that a majority of those eligible vote, and a majority of that majority vote for such a union; or *third,* that a majority of those voting vote for such a union. When the Board showed conclusively that the third possibility was sufficient in the opinion of the courts, they seemed to feel that the problems of the *R. C. A.* case were disposed of.[21]

A year later, in August, 1937, the Board was confronted in *In the Matter of American France Line*[22] with a case where two bitterly rival unions were in the field; and the Board suddenly realized that it would not be reasonable to infer from the election returns that the abstainers were expressing the same choice as the voters. Abstainers might object to both unions, but they could not vote against both. There was no such choice upon the ballot. Accordingly, the Board on its own motion initiated a policy of inserting a

[18] *See* William Gorham Rice, Jr., *The Determination of Employee Representatives* (1938) 5 LAW AND CONTEMPORARY PROBLEMS 188, 219-220.

[19] In the Matter of the Associated Press, 1 N. L. R. B. 686, 697 (1936).

[20] In the Matter of R. C. A. Mfg. Co., 2 N. L. R. B. 159, 173 (1936).

[21] *Id.* at 173 *et seq.*

[22] In the Matter of American France Line, 3 N. L. R. B. 64 (1937), *amended decision,* at 74-76. Compare with McNulty v. National Mediation Board, 18 F. Supp. 494 (N. D. N. Y. 1936) under the Railway Labor Act, 48 STAT. 1186 (1934); 45 U. S. C. § 152 (1940), whereby a ballot allowing choice of either the one union which was a candidate, or any other union to be written in, had been disapproved by the court and a new election had been suggested with a ballot similar but containing a space to vote against any collective bargaining at all.

space for a "no-union" choice on each ballot in the original election. This policy was adhered to, after oral argument against it on behalf of two unions, in *In the Matter of Interlake Iron Corp.*[23] As Professor William G. Rice has pointed out,[24] the adoption of this policy ended an anomalous situation which had existed from July, 1936, to August, 1937. During that period it had been impossible for one of two competing unions to fail of certification for the want of a majority vote although one union alone could do so, as could also one of three unions or more. The adoption of this new policy in 1937 precipitated the questions of the run-off election with which we are chiefly concerned in this article, because from then on every election involving two unions presented the voter with three choices.

Although the policy of ordering run-off elections had been early adopted by the Board[25] and the problem of the run-off had been alluded to in the *Interlake Iron Corp.* case,[26] the issue was first squarely raised and the technique was first carefully explained in *In the Matter of Coos Bay Lumber Co.*,[27] decided on October 26, 1939. This case decided that the run-off election must offer a choice between the union which had received the largest number of votes and no union at all. Next year the Board swung to a different result—a run-off between the two unions—*In the Matter of R. K. LeBlond Machine Tool Co.*[28] This decision, the *Coos Bay* case, and the *General Motors* case[29] also in 1940, where no decision could be made, have already

[23]In the Matter of Interlake Iron Corp., 4 N. L. R. B. 55 (1937), Commissioner Edwin S. Smith dissenting. This decision expressly overruled so much of In the Matter of International Mercantile Marine Co., 1 N. L. R. B. 384 (1936), as had rejected, at pages 390-391, the company's request that the ballot contain a space in which to vote for "individual bargaining" and had ordered that the ballot contain the names of the three contending unions only.

[24]*See* note 18 *supra;* 5 LAW AND CONTEMPORARY PROBLEMS, at 219-220 and especially n. 171, at 220.

[25]It appears to have been adopted first in In the Matter of Fedders Mfg. Co., 4 N. L. R. B. 770 (1938), though without thorough discussion of the problems involved. This decision was made by Chairman Madden and Mr. Edwin S. Smith. Mr. Donald W. Smith took no part. In the absence of dissent on the Board, the reasons for the decisions were not elaborated here, as they were elaborated later in the *Coos Bay* case. There Chairman Madden remarked [16 N. L. R. B. 476 (1939)]: "In accordance with our *usual policy* we shall direct a run-off election to determine whether or not the employees in the unit desire to be represented by the United [which had received 195 votes, 7 more than the second union]. In view of the objections raised by the dissenting opinion to the holding of run-off elections, we shall first set forth in some detail the considerations which have seemed to us controlling in the determination of these issues." (Italics ours.)

[26]In the Matter of Interlake Iron Corp., note 23 *supra. See* especially Mr. Edwin Smith's dissenting opinion at 63.

[27]*See* note 5 *supra.*

[28]*See* note 6 *supra.*

[29]*See* note 7 *supra.*

been mentioned, and also the Regulation of 1943[30] which sought, three years later, to compromise their results. Inasmuch as this trio of decisions were made by the same Board members in the three cases, and inasmuch as each member held consistently to his own views throughout, it will perhaps simplify review of these opinions to treat them as if they had been written in one case instead of three.

The "Majority Problem" as Viewed by the Board in 1939 and 1940

CHAIRMAN MADDEN: The Act does not prescribe any particular form of ballot for an election; nor other details for any method which may be used. Run-offs are a common feature of elections. The use of this device involves no fundamental issue of policy. Even though the results of a run-off can be characterized, correctly, as a "second-choice majority", the Act does not prohibit the Board from using it or from considering the results it may give.

MR. SMITH: In full accord with Mr. Madden. The run-off election is completely authorized by law.

MR. LEISERSON: The Act does not authorize run-offs, nor any other kind of preferential voting. Run-offs take various forms. The most common is an election between the two highest choices. Whether "simple" majorities, second choices, or other forms of preferential voting are preferable is a political question on which the people of the country have strong differences of opinion. The other two members of the Board, who agree that run-offs are legal, cannot even themselves agree on what type of run-off the Board should order. This by itself proves that the problem is one of policy. The Board has no power to settle such problems of policy. The Act states explicitly that a majority shall determine the issue of representation. If an election fails to produce a majority, the petition for investigation and certification must be dismissed, in every case as a matter of law. Congress was aware that the ballot might contain more than two choices and that an election might fail to produce a majority for any one. If it had been the intention of Congress to permit a run-off, or any other method of ascertaining second choices (like a multiple-choice ballot-form), Congress would have said so in the Act.[31]

The "Interpretation Problem" as Viewed by the Board in 1939 and 1940

CHAIRMAN MADDEN: Those voting for a union which did not receive the

[30] *See* note 9 *supra.*
[31] *See* note 5 *supra,* especially 16 N. L. R. B. 476, 480-482 (1939).

plurality might prefer the union which did receive it to no collective bargaining at all, or they might prefer "no-union." These voters should have an opportunity to vote on that choice in a run-off between the plurality union and no union. The negative choice must be preserved in the run-off, because it is against the policy of the Act to force union representation upon any group against the will of the majority of that group. If "no" does not appear on the run-off ballot, the result may frequently be just that, because it is not a fair inference, with union rivalries as bitter as they are, that a vote for one union indicates a desire for collective bargaining even through another union. And in an industrial election it is not necessary, as it is in a political election, that some representative be chosen. For these reasons, the run-off should be between Union *A* and "no-union" even in such an original election as, for example: Union *A,* 49 votes; Union *B,* 45; "no-union", 6.

MR. SMITH: Every vote for any union is a vote for collective bargaining. Though an original election showed one union a poor third, still the run-off should be between the two unions. The "no-union" choice should always be dropped. Even if there were 49 votes for "no-union", 45 votes for Union *A,* and 6 votes for Union *B,* the run-off should be between Unions *A* and *B.* "I am not willing to assume that the rivalry between the membership of two labor organizations is normally so intense that the adherents of each would prefer no collective bargaining to collective bargaining through the other organization."[32] In any case, the policy of the Act is to encourage collective bargaining, not to discourage it.

MR. LEISERSON: The effort of a *Coos Bay* type of run-off to give the majority of workers an opportunity to unite on one union is illusory. Those who are opposed to the union in the lead are arbitrarily forced either to vote for "no-union" or to vote for the union to which they are opposed. The Board should not encourage workers to desert one union for another.

If a run-off there must be, the *LeBlond* type is the better, eliminating the "neither" choice from the ballot. "Those who desire no collective bargaining whatever had their opportunity to express their opinion" to that effect in the original election; and (referring to the *LeBlond* case) it was less than 8% of all the voters who voted for "neither."[33]

The unexpressed conclusion from Mr. Leiserson's last remark seems to be: A vote for any union is a vote for collective bargaining if the vote for

[32]*See* note 6 *supra,* 22 N. L. R. B. 468-469 (1940). Note how obviously this statement is couched in terms of emotion rather than in strictly rational terms.
[33]*Id.* at 469-470.

"no-union" is small. As a matter of logic, the *non sequitur* is obvious. As a matter of fact, there is probably some degree of correlation. This appears if one reflects upon the extreme cases. If 49 voters chose "no-union"; 45, Union *A;* and 6, Union *B;* it would be reasonable to suppose that some of the voters for Union *B* might prefer "no-union" to Union *A,* justifying a *Coos Bay* run-off, if any. On the other hand, if 6 voters chose "no-union"; 49, Union *A;* and 45, Union *B;* it would be reasonable to suppose that not enough of the 45 votes for Union *B* would swing to "no-union" to raise the 6 to a majority.

Mr. Leiserson asserted, without contradiction, that about half of the *Coos Bay* run-offs held by the Board did in fact result in a majority vote for "no-union."[34] From this he concluded that the Board would have done better to dismiss the petitions at once without bothering with the formality of a run-off. But what of the other half of the cases in which a *Coos Bay* run-off did show a majority voting for one union? And even in the half of the cases where "no-union" was the final choice, would not the morale of the pro-union workers be better after a run-off had proved that no union was wanted, than it would have been if the petition had been dismissed immediately upon the original election, as Mr. Leiserson thought it must be?

Mr. Leiserson's argument assumed that a free first-choice majority is a real—an ascertainable—phenomenon. But choice, as a practical matter, means a selection between available possibilities. The limits of a choice are the possibilities presented. The possibilities presented, in this case, are the competing unions plus a "no-union" choice. If there is but one union, the choices are two, that union or none; and Mr. Leiserson evidently felt no doubt that the choice between these two alternatives was a "first-choice majority" such as the statute, in his opinion, required. Any worker, however, may have had a personal predilection for some other union which was not even seeking to be certified. If a real personal first choice, by every voter, were required, the vote might scatter among a dozen unions. In the ordinary election, with but one union in the field, many votes may be second or third choices. Yet no one would claim them to be any the less valid for that. In practice, effective choice exists only under those certain conditions which are given. A write-in ballot, even where allowed, rarely has much actual effect.

Because Congress knew the facts about the practical working of elections, it can hardly be assumed to have limited the Board to ascertaining first personal choices and those alone.

[34] 16 N. L. R. B. at 482, *see* note 5, *supra.*

We may now glance at the fate of the problems in the courts. Concerning the "majority problem" it is now much clearer than it was in 1940 that Messrs. Madden and Smith were right, and Mr. Leiserson was wrong. The Board may use an election, or not, as it wishes. If it does, it may adopt policies and promulgate regulations making for accurate recording of the vote so long as it does so within the framework of the principles of majority rule.

In reversing a decision by the First Circuit Court of Appeals that an election was void because the Board had declined to investigate a challenge which came too late to comply with the Board's rules, the Supreme Court, in *National Labor Relations Board* v. *A. J. Tower Co.*, decided on December 23, 1946, said:

> "As we have noted before, Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. [Citing cases.] Section 9(c) of the Act authorizes the Board to 'Take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.' In carrying out this task, of course, the Board must act so as to give effect to the principle of majority rule set forth in Section 9(a), a rule that 'is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.' S. Rep. No. 573, 74th Cong., 1st Sess., p. 13. It is within this democratic framework that the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily."[35]

A second-choice ballot does comport with the principle of majority rule. In fact, it is the only method which really does so.

In *National Labor Relations Board* v. *Standard Lime and Stone Co.*,[36] Circuit Judge Parker, after an excellent review of the authorities which permit certifications based on a majority of those voting (even where a majority of those eligible did not vote), had this to say of the Company's objection to a run-off election:

> "And we are not impressed with the contention that the Board's certification may be ignored because 'neither' was omitted from the choices

[35] 329 U. S. 324, 330, 67 Sup. Ct. 324, 328 (1946). Opinion by Murphy, J., Frankfurter, J., concurring in result. Jackson, J., dissenting in opinion. *See* note 44 *infra*. And the same Court, in an opinion by Mr. Justice Rutledge, has declared that "Nothing in § 9(c) requires the Board to utilize the results of an election or forbids it to disregard them and utilize other suitable methods." Inland Empire Council v. Millis, 325 U. S. 697, 707, 65 Sup. Ct. 1316, 1321 (1945); (Roberts, J., diss. without opinion).

[36] 149 F. (2d) 435 (C. C. A. 4th, 1945), *cert. den.* 326 U. S. 723 (1946).

submitted in the run-off election. On the first election only 57 of the votes cast registered that choice, which was less than the votes cast for either of the unions. It could not be unreasonable to drop in the run-off the choice which had received the lowest number of votes. This is quite usual procedure in other elections and we can see nothing unfair in applying it here. A former policy of the Board with respect to such cases was to drop from the ballot the organization receiving the smaller number of votes and limit the choice in the run-off between the organization receiving the larger number and no representative. Matter of Aluminum Company of America, 12 N. L. R. B. 237, 239; Matter of Coos Bay Lumber Co. 16 N. L. R. B. 476, 479, 480. The practice of dropping the choice 'neither' from the run-off ballot was adopted in 1940. Matter of R. K. LeBlond Machine Tool Co. 22 N. L. R. B. 465; Fifth Annual Report of N. L. R. B. p. 60. It is based upon the Board's view that where in an original election the combined vote for two labor organizations constitutes a majority of the votes cast, the employees have expressed a desire to bargain collectively through some representative.

It is worthy of note that some time after the elections here were held the Board conducted a public hearing for the purpose of determining its future policy in dealing with run-off elections, and solicited the views of employees and labor organizations. As a result of the hearing some changes were made in certain of the rules as to run-off elections, but the rule here applied was not changed. We think that there can be no question but that the rule applied was in accord with the Board's settled and established policy and well within the discretion vested in it under the law. 'The Board enjoys a wide discretion in determining the procedure necessary to insure the fair and free choice of bargaining representatives by employees.' Southern S. S. Co. v. N. L. R. B., 316 U. S. 31, 37, 62 Sup. Ct. 886, 890, . . ." [and citing other cases].[37]

Except as these remarks have touched on what kind of run-off the Board may hold, there seems, surprisingly, to be only one court decision of that question.

In *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*,[38] Circuit Judge Hicks upheld the objections of this union to a *Coos Bay* type of run-off which had eliminated it from the ballot. He said:

"We think the order was illegal and that the proposed election was unfair in effect. It was in the teeth of the policy formulated in the statute, that the employees should be protected in the exercise of full freedom of designation of representatives of their own choosing. The employee was not given full freedom of choice. If he voted he could

[37] *Id.* at 439. For the text of the 1943 regulations on run-off elections, *see* note 9 *supra*.
[38] 105 F. (2d) 598 (C. C. A. 6th, 1939).

either ratify or reject the nominee of the Board but if he rejected it he was through. He had no alternative,—he could not choose for himself. He could take the representative offered him or none at all,—a parallel of Hobson's choice.

"Moreover, the order violates the 'majority rule' provided by Sec. 9(a). The intention of this section is that a majority of those voting should select their representatives. If a majority should indicate by their ballots that they did not desire to be represented by the U. W. O. C. [the union which had received the largest number of votes in the original election] nothing has been accomplished. No selection of representatives has been made and collective bargaining falls, notwithstanding that in the first election 2,238 out of 2,806 voters indicated their desire for collective bargaining. The purpose of the election was to select, not to reject, representatives."[39]

Since this decision was reversed by the Supreme Court,[40] on the ground that the Board's order of the run-off election was not appealable to the Circuit Court, Judge Hicks' remarks may be thought to lack authority. Certainly they lack logic, for these reasons: *First,* his reference to "the nominee of the Board" overlooked the fact that the Board did not "nominate," but merely advanced into the final round the union which had been given the most votes by the voters. Judge Hicks would apparently have approved the Board's "nomination" of both unions and its passing over of the "no-union" choice. *Secondly,* Judge Hicks was in error in thinking that some union must be chosen, to satisfy the Act, since—and here is a *third* mistake—every vote for a union was a vote for collective bargaining.

Judge Hicks' criticism was sound, however, to the extent that it emphasized the fact that, in a *Coos Bay* type of run-off, the Board chose the union which was to remain in the running without knowing what a majority of the voters would wish. This determination, usually crucial, had to be based either on guesses of what the workers would have wanted if they had been consulted, or on Chairman Madden's rather rigid concept of policy which insisted on retaining "neither" under any and all circumstances. Agreeing that the Board is free to pursue its investigation by progressively narrowing the field of possibilities and then putting the question of the ballot again, the question is: how should the field be narrowed? All three of the Board members, as well as Judge Hicks, recognized accurately that the Board's decision of what spaces should go on a run-off ballot can have decisive effects.

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[39]*Id.* at 600.

[40]National Labor Relations Board v. International Brotherhood of Electrical Workers, 308 U. S. 413, 60 Sup. Ct. 306 (1940).

Assuming, for argument, that none of the voters changes his mind in a run-off, its results will fall somewhere between two extremes.

At one extreme will be this result: those voters who originally voted for the two choices which reappear upon the run-off ballot will vote again as they did before; and those who originally voted for the choice which is dropped from the run-off ballot, being unwilling to express any second choice, will abstain from voting. The invitation to register a second choice is not accepted. At this extreme it is obvious that the Board's choice of the squares for the run-off ballot has entirely decided the election. The plurality of the ballots cast in the original election has become an apparent majority, simply by cutting down the size of the vote. The Board could have reached the result as effectively, without the formality of a run-off. The only advantage is that the Board can now point to the formal existence of a majority for one choice, of all the ballots which have been cast, in compliance with what is erroneously assumed to be a requirement of the statute. But the whole effect, on these assumptions, is done with mirrors and the "majority" obtained is both fictitious and factitious.

At the other extreme will be this result: those who originally voted for the two choices which reappear still vote as they did before; but those who voted for the eliminated choice all troop to the polls and cast their "second-choice" ballots. The Board's decision has now determined whose "second-choices" shall count. These "second-choices" may then affect the outcome, but they will do so only upon conditions which are somewhat artificial. These conditions are that the second-choice votes split unevenly between the two reappearing choices and, further, that this unevenness is in the opposite direction from the original voters' unevenness, and of sufficient magnitude to more than counterbalance it. Why should the second-choices of one group of voters be arbitrarily selected to be counter, while the second-choices of the others remain impotent? Here it is only slightly less obvious that the Board's decision of the make-up of the run-off ballot has had a substantive effect upon the outcome of the election, and has quite probably decided it.

By the Rule of 1943[41] it was silently stated, in substance, that if the votes of a plurality should be for "no-union," it must be conclusively presumed that the others, who voted for one union or the other, would prefer "no-union" if they could not get the one they wanted; but that if the vote for "no-union" were second largest, or less, then it must be presumed conclusively that inter-union rivalries were not so bitter, and accordingly that a vote for any union

[41] *See* note 9 *supra* for the text.

was a vote for collective bargaining. Such presumptions invite critical thought. Where the effect is to make the meaning of one voter's vote depend upon the number of votes cast by a different group for a different choice, the justice of the rule is difficult to swallow. Logic, and the analogy of political run-off elections, would have suggested eliminating all but the two highest choices. But even that would not remove the crucial question of interpretation from the realm of guesswork.[42]

All of these attempted solutions disenfranchise that voter who would prefer no union if his own is not to be selected. Except in the case where "no-union" has received the plurality, he simply cannot register that choice, either by voting or by abstaining, either at the original election or at the run-off. And in view of the large powers given to the statutory union, over the working lives of all the workers in the unit, it is undemocratic and contrary to the policies of the Act to impose such a representative on a worker who has never had an opportunity to vote against it.

The Board asserts, quite recently, that it gave careful consideration to the plight of this disenfranchised voter before it adopted the Rule of 1943.[43] But since the only result of that consideration was the Rule of 1943, which does not remedy the evil, it is to be expected that the present members of the Board will be willing to consider this question once again, especially since it involves to some extent rights of unorganized voters objecting to any union (with whom our disenfranchised voter might join if he could vote) who are least able effectively to insist upon fair play for themselves. Employers should not try to represent them, for their motives would be reasonably suspect if they did. Therefore the Board alone can do the job. Mr. Justice Jackson expressed an awareness of the need of according the protections of democracy to the unorganized worker, in his dissenting opinion in *National Labor Relations Board* v. *A. J. Tower Mfg. Co.*[44] A consent election had been held pursuant to an agreement between the company and a union, in accordance with the Board's Rules. Challenge of one crucial pro-union vote was made too late, under those rules, and the majority of the Court upheld the election. Mr. Justice Jackson noted that "a third and, as usual, a forgotten interest" was involved: the workers "who did not want

[42] *See* notes 32 and 39 *supra*.

[43] In the Matter of Scripto Mfg. Co., 67 N. L. R. B. 1078, 1079 (1946); In the Matter of John Oster Mfg. Co., 61 N. L. R. B. 1622, 1623 (1945).

[44] 329 U. S. 324, 335-338, 67 Sup. Ct. 324, 330-331 (1946). *See also* note 35 *supra*. The disenfranchisement of the anti-union voter has the effect of furnishing real ammunition to the anti-union writer. The views of such a recognized friend of labor as Judge Madden furnish material for the castigation of the Board's run off procedures in such a book as ISERMAN, INDUSTRIAL PEACE AND THE WAGNER ACT (1947) 24, 29, 80.

to be represented by the union." That group cannot bring their problems to the Board or to a court. Inquiry is cut off, unless the company makes a timely objection on these workers' behalf. Half the employees "are forced to accept union representation as the result of an election in which they were not allowed to protect the ballot, and those who were, failed to do so."

The arbitrary element, which disenfranchises voters and decides elections by fiat, is not *necessary*. A second-choice ballot would eliminate it, and would also sweep away the whole institution of the run-off with its expense, its wasted effort and its delay. The ballot in the original election need only contain a second set of spaces for the recording of a second-choice, with, for example, a heading like this:

> *"Vote below for your Second Choice.*
>
> Place a cross in the square representing your second choice. This will be counted only if no choice receives a majority (more than half) of all first-choice votes cast. The vote below, to be valid, must be cast for a different choice from your first-choice vote."

Two objections have been urged against the use of a second-choice ballot. *First,* that it would be illegal. *Second,* that it would be unworkable.

Since the courts now recognize that the Act does not require any first-choice majority, or any majority at all, of those eligible, the objection to legality can hardly be maintained. The objection here must be that certification based in part on second-choices cannot comply with the statute. But in a run-off the "majority" obtained may be entirely illusory, a result not of increasing the percentage obtained by the choice but of cutting down the number who vote. The ratio of those who vote for the certified union to all the workers in the unit may be the same in the run-off as in the original election. And such change as there is results in general from the expression of second-choices. Yet the legality of certification based on a run-off is unquestioned. If the statute were read as setting any requirement of a majority of votes cast, therefore, the established legality of run-off elections would show that this requirement could be satisfied by a mere "lip service," by a simple reduction in the number of voters so as to transform the plurality of yesterday into the majority of today, though consisting of the same voters who voted before. It is submitted that such a reading, demonstrably farcical, would not be adopted by the courts, and that a broad and unrestricted grant of power to use elections in any sensible way was what the Act conferred.

If this is sound, the Board is legally free to utilize second-choices, as evi-

dence, in deciding the ultimate issue which it is commanded to decide, *viz.*, whether a majority of the workers in the unit probably (in view of the possibilities available) want any union, and if so, which.

The objection of impracticability is not more impressive. Proportional representation, which is much more complicated than a simple second-choice ballot, has worked adequately in political elections. The notion that poorly educated workers might become confused and be unable to express a proper second choice is unrealistic. An ordinary five-year-old child can understand a second choice—something he would like if he cannot have what he wants most. The American worker, even the backward and poorly educated one, is amply competent to express a second choice intelligently. (There would doubtless be some exceptional units in which great illiteracy, or special difficulties of language, would make the second-choice ballot unwise. In such cases continuance of present methods would always be within the Board's discretion.)

The procedure would be as follows:

The First Step

Tabulate all first-choices. If any union has a majority, that union would be eligible for certification. Whether it should then be certified, might depend on other considerations, such as its character and democratic processes;[45] but in any event the election would have told all it could and would be at an end. If "no-union" received a majority, similarly, the petition would of course be dismissed.

If no choice has a majority, two further steps are needed, in conjunction, to decide the question: which union the workers want, if they want any. The second step alone can give no final result, but must be used as a preliminary to the third step, which answers the question.

The Second Step

Assume that with such a ballot, the first-choice votes, in a number represented by a, have been cast for Union A; in the number b, for Union B; and in the number n for "Neither." (If a or b were more than half the valid first-choice votes cast, Union A or B would, as noted, usually be certified, and if n were more than half, the petition would be dismissed.)

But since there is no such majority, the second step will be to ascertain which of the two Unions A or B, is the favorite. Add to a those of the n

[45]Tenth Annual Report of the National Labor Relations Board, (1946) 16-18.

ballots for "Neither" which designate Union A as second-choice. These may be referred to, for convenience, as the "$(n_2)a$" votes. Add similarly to b the $(n_2)b$ votes for Union B as a second choice. Now if $a + (n_2)a$ is greater than $b + (n_2)b$, Union A is the union favored by the majority of the voters *in a choice between the two unions only;* whereas if $b + (n_2)b$ is greater than $a + (n_2)a$, Union B is favored *on such a choice.*

Assume now that $a + (n_2)a$ has turned out to be greater than $b + (n_2)b$. In that case all the a votes are now seen to be votes for collective bargaining. The voter of an a vote has said: "I want collective bargaining if I can be represented by Union A." This condition is necessarily fulfilled, because a majority of the voters have said: "We want Union A if we are to have any union, rather than Union B."

The n votes are of course votes against collective bargaining.

The second step, thus completed, is similar to a *LeBlond* run-off in that it gives expression to the second-choices of those who voted their first-choices for "no-union". But it differs from a *LeBlond* run-off in that it purports to decide no more than the "problem of interpretation" as it relates to the votes cast for one union or for the other. It simply determines—and determines accurately—that some of the votes for a union really were votes *for collective bargaining* (as all such votes have so often been surmised to be). The votes for the union which is not the favorite still remain in doubt in this respect. This doubt is then resolved by

The Third Step

The second-choices of those who voted b votes must now be examined. The $(b_2)a$ votes are to be added to a and the $(b_2)n$ votes are added to n. If $a + (b_2)a$ is greater than $n + (b_2)n$, Union A would be certified; but if $a + (b_2)a$ is less than $n + (b_2)n$ the petition would be dismissed. The $(b_2)a$ votes said: "If I cannot elect Union B then I want Union A"; while the $(b_2)n$ votes said: "If I cannot elect Union B I don't want any." The condition in each case is fulfilled because Union B cannot be elected against the majority of first-choices and second-choices for Union A.[46]

[46]The writers are indebted for the genesis of this proposal to *Run-offs in the N. L. R. B. Elections,* (1939) 8 INT. JURID. ASS'N BULL. (No. 3) 25, 26. This excellent treatment of the subject proposes a second-choice ballot. The decision whether any union is to be certified, however, would be made differently under that proposal. In the terminology of the discussion in the text above the a votes would first be added to the $(b_2)a$ votes and the b votes would be added to the $(a_2)b$ votes. If either $a + (b_2)a$ or $b + (a_2)b$ were a majority of the number of ballots cast, the issue of collective bargaining, or none, would be deemed to be affirmatively settled, and the

A couple of examples may help, by illustration, to make it clearer how these processes would work in practice:

Example 1: B *Union Elected*

1st Choice	a 40		b 32		n 28		100
	$(a_2)b$	$(a_2)n$	$(b_2)a$	$(b_2)n$	$(n_2)a$	$(n_2)b$	
2nd Choice	21	12	8	23	6	20	90

(It is assumed that 10% of the voters have failed to vote any second choice.)

First step: There is no majority.

Second step: $b + (n_2)b$ is greater than $a + (n_2)a$.

32 + 20 equals 52; 40 + 6 equals 46.

Hence Union *B* is *the favorite as between the two unions.*

Third step: $b + (a_2)b$ is greater than $n + (a_2)n$.

32 + 21 equals 53; 28 + 12 equals 40.

Hence Union *B* wins the election.

Example 2: Petition Dismissed

1st Choice	a 40		b 32		n 28		100
	$(a_2)b$	$(a_2)n$	$(b_2)a$	$(b_2)n$	$(n_2)a$	$(n_2)b$	
2nd Choice	12	22	8	23	18	7	90

union to be certified would then be determined by adding the $(n_2)a$ votes to the a votes and the $(n_2)b$ votes to the b votes, the greater sum to indicate the winner. It is submitted that this fails to consider the fact that $a + (b_2)a$ may be greater than a majority, and yet, assuming $b + (n_2)b$ is greater than $a + (n_2)a$, still $n + (a_2)n$ may be greater than a majority. To illustrate with actual figures:

							Total
1st Choice	a 35		b 32		n 33		100
	$(a_2)b$	$(a_2)n$	$(b_2)a$	$(b_2)n$	$(n_2)a$	$(n_2)b$	
2nd Choice	13	19	21	7	6	24	90

(It is assumed that 10% of the voters have failed to vote any second choice.)

The INT. JURID. ASS'N BULL. method would certify Union *B* on these figures because $a + (b_2)a$ gives a majority of 56 and the n second-choices are therefore to be distributed. $b + (n_2)b$ equals 56 which carries the election over $a + (n_2)a$, 41. The result is wrong, it is submitted, because the 33 whose first choice was no-union, and the 19 voters whose votes said: "We want Union *A* but if we can't have it we don't want any" aggregate 52 votes, a majority, and should have resulted in a dismissal of the petition.

(It is assumed that 10% of the voters have failed to vote any second choice.)

First step: There is no majority.

Second step: $a + (n_2)a$ is greater than $b + (n_2)b$.

40 + 18 equals 58; 32 + 7 equals 39.

Hence Union *A* is *the favorite as between the two unions.*

Third step: $n + (b_2)n$ is greater than $a + (b_2)a$.

28 + 23 equals 51; 40 + 8 equals 48.

Hence the petition should be dismissed.

No system of this sort would be desirable, even if it were correct in theory, if it could not be simply explained to the voters, in terms appealing to their sense of fairness. This system can be so explained. For example, it could be stated that:

"If either Union gets more than half of the 1st-choice votes, it will win.

"If 'Neither' gets more than half of the 1st-choice votes, neither Union will win.

"If there is no such majority, the 2nd-choice votes of those voting 'Neither' will be added to the other votes for the unions, to see which Union leads.

"That Union will win the election, unless those whose 1st-choice was against it voted 'Neither' (2nd-choice or 1st-choice) on more than half of all the ballots cast, in which event, neither Union will win the election."

If even this seems too complicated, the Board might advise the workers simply that "If no first-choice choice wins, second-choices will then be considered." This might suffice. Indeed, it should when it is remembered that the union leaders, whose business it is to understand and expound the minutiae of such things would have available the text of any new regulation which the Board might adopt to put the proposal into effect. Such a regulation in fact could hardly be more complicated than the present Regulations.[47]

And in fact the complications would not be as formidable as they might seem at first blush. The principles are simple. The tabulations and calculations, with the aid of modern business machines, would be quick and easy to make. It would certainly be much easier and cheaper than conducting another full-scale election.

There might be more dismissals than under the present Rules. But if so, it would be because of the giving of accurate effect to a policy of the Act. Chairman Madden's solicitude to avoid imposing compulsory representation by a union, on workers who have had no chance to vote against it, should

[47] *See* note 9 *supra.*

not be dismissed lightly, in spite of the fact that he carried its application too far.

A tie between first choices would normally be broken by the counting of the second-choices. If the sums of first- and second-choices are tied, the sum containing the larger first-choice might properly be held to prevail. In the unusual case of a tie of first-choices combined with a tie of second-choices, which could hardly occur in any election of size, an actual run-off might be ordered, to break the tie. But this would be so rare as not to cut seriously into the advantages of the proposal. It is the large elections which consume money, time and effort, and just in those the mathematical chances of such a tie would be the least.

The method could be used with three or more unions, as well as with two, except that with more than two choices upon the ballot, a majority might not be obtainable by the final step of the calculation. The Board might either certify (or dismiss) on a substantial plurality, or experiment with multiple-choice ballots. These, if workable, would of course give the most accurate results.[48]

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[48]Elections involving more than two unions are unusual but by no means unknown. In such an election the "Second Step" can be taken with the same accuracy as for an election involving two unions. The "First Step" cannot. Its objective, to determine which is the favorite choice *as among unions,* is blocked by the fact that there are no longer two alternatives, to which all votes can be distributed, but three or more possibilities.

In an election among three unions there would be four choices; and each ballot might contain three boxes. (The fourth box would be immaterial, just as a third box would be immaterial in an election between two unions, for the obvious reason that it would be equivalent to an abstention.)

The "First Step" would be begun by counting all ballots as though the votes for "None" did not exist:—*i.e.,* an $(n2)$ *a.* $(n3)$ *b* ballot or an $(a2)n$ $(a3)b$ ballot would be grouped with the $(a2)b$ ballots, *etc.* The result would be tallies of first (union) choices and second (union) choices, for each of three unions. If one union had a majority of all the first (union) choices this "First Step" would be finished, because the favorite union would be thereby determined. If not, several ways of proceeding would be open: (1) The second (union) choices of those voters whose first (union) choices were for the lowest of the three unions might be distributed among and added to the first (union) votes cast for the other two. (This would correspond to the technique used in a political run-off.) If four or more unions were involved, this might have to be done more than once. A majority would eventually be obtained. (2) The plurality of first (union) choices might be treated as determinative. (This would raise a question of the legality of a certification based on a plurality. But if the "Second Step" has subsequently shown more workers wanting the plurality-union than "None", the legal question should hardly be more serious, in theory, than in the case of a certification after a *Coos-Bay* run-off.) (3) Second (union) choices could be added to the first (union) choices. This suffers from two objections: *First,* that no majority needs result, and if none does result, this method would be as vulnerable as the second method mentioned above. *Second,* it might seem unfair to the leading union that the second choices of those who had given their first choices to it should count as heavily as those first choices. But in view of the element of relativity inherent in

The saving of time, one of the most vital considerations in the settlement of a labor dispute, would be a consideration of prime importance in favor of the proposal. Labor disputes differ from most disputes in that the contestants have to live together and work together. A prompt settlement which is wrong is often better for all parties than a sounder settlement made after a delay of months. This article advocates a prompt settlement which is right, as against a delayed settlement, as at present, which is likely to be wrong.

In seasonal industries delay is particularly disastrous, as will be seen by noting the difficulties which the Board encountered in the salmon-fishing business, as recorded in *In the Matter of Alaska Salmon Industry, Inc.*[49] There a new election, between all competing unions, had to be ordered because the holding of a true run-off in the second season would have been unfair, on account of the extensive shifting of workers which had occurred between seasons. If the Board should wish to experiment with second-choice ballots, seasonal industries might be a desirable point at which to start. But speed of decision is a crying need in almost any industry.

For the reasons which have been stated we believe that the National Labor Relations Board has authority to utilize second-choice ballots if its members should agree that this would best effectuate the policies of the Act. But if other amendments to the Act were being considered by Congress, for other reasons, there would be some advantage in a declaratory addition to § 9(c) which might read:

> "In taking such a secret ballot in any case in which two or more unions are involved the Board may utilize any method, including second-choice or multiple-choice ballots, which will effectuate the policies of this Act."

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any choice, it would not be entirely arbitrary, where no union has a majority of first choices, to turn to the second choices and bring them in as of equal weight. (Any weighting of first choices as against second choices would probably be too arbitrary to be desirable.)

The "Second Step" would be taken by opposing the ballots on which the favorite union (as determined by the "First Step") appeared ahead of "None" on the one hand, to the ballots on which "None" appeared ahead of the favorite union on the other.

[49]In the Matter of Alaska Salmon Industry, Inc., 64 N. L. R. B. 339 (1945).

ADDENDUM

In Case 8-R-2497 announced May 26, 1947 Chairman Herzog (concurring because of the Board's rules) says that on the merits he doubts the assumption that a majority for two unions means a majority for collective bargaining, and he prefers the political method of run-off between the two highest choices. The Taft-Hartley Law enacts this method. (Title I, § 101, amending the Wagner Act at § 9(c) (3)).